88-1224

NO._____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL REED,

Petitioner,

v.

NORTHWESTERN PUBLISHING COMPANY, d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I

QUESTION PRESENTED

Whether Petitioner, a patrolman for the Danville, Illinois Police Department, is a public official within the meaning of **New York Times Co.v. Sullivan**, thereby requiring Petitioner to prove actual malice to recover damages in a libel action.

II

PARTIES BELOW

Petitioner:

Michael Reed

Respondents:

Northwestern Publishing Company, d/b/a The Commercial News; Bob Wilson and Carl Young

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---o---

MICHAEL REED petitions for a Writ of Certiorari to review the decision of the Supreme Court of Illinois in this case.

V

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 124 Ill.2d 495, 530 N. E. 2d 474, 125 Ill.Dec. 316 (1988)

JURISDICTION

The decision of the Supreme Court of Illinois was announced on October 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the government for a redress of grievances.

United States Constitution

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. §1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Petitioner, Michael Reed, brought this action to recover damages for libel. A Summary Judgment Order was entered in favor of Respondents on June 29, 1983 which determined that Petitioner was a "public official" for the purpose of applying the test of **New York Times v. Sullivan.** (R. 397-406) The Appellate Court of Illinois affirmed the trial court on that issue but reversed the trial court on other matters. **Reed v. Northwestern Publishing, et al,** 129 Ill.App.3d 133, 471 N.E.2d 1071 (4th Dist, 1984). (R.436-455) The cause was remanded to the trial court for trial. At the close of all the evidence in that jury trial the Respondents moved for a directed verdict. The motion was granted as to Respondent Carl Young and denied as to the other two Respondents. (R.483)

The case was submitted to the jury on special interrogatories. The jury responded that, although the articles of Respondents

were false, the articles were not published with actual malice. The trial court thereupon entered a judgment for the Respondents on the verdict. (R.484) The Petitioner thereupon filed his post-trial motion raising again the issue of Petitioner's status of "public official" (R.486-505) which post-trial motion was denied. (R.522-523)

The Petitioner timely filed an appeal to the Fourth District Court of Appeal for the State of Illinois. The Fourth District affirmed the judgment of the trial court. **Reed v. Northwestern, et. al.**, 159 Ill.App.3d 699, 512 NE2d ;828 (4th Dist, 1987). (A.63). A petition for discretionary review was timely filed with the Supreme Court of Illinois and the petition was granted.

The Supreme Court of Illinois affirmed the decision of the Fourth District Court of Appeal holding that Petitioner was a public official, citing **New York Times v. Sullivan**, 376 U.S. 254 (1964). (A.1)

The earliest stage of the proceedings wherein the federal question of whether Petitioner was a public official was raised was in the trial court during the pleading stage and was argued in the first appeal. The same federal question was briefed and argued before the Fourth District Court of Appeal for the State of Illinois and also before the Supreme Court of Illinois which affirmed the decision of the trial court and the Fourth District Court of Appeal holding that Petitioner was a public official. (A.1.)

The Petitioner, Michael Reed, alleged in his Second Amended Complaint that he was libeled by the Respondents, Northwestern Publishing Company, publisher of *The Commercial News*, and two of its reporters, Bob Wilson and Carl Young. The Respondents had published that Petitioner was named in a Grand Jury Report as being a burglar and as being involved in a police burglary ring. The Respondents, Carl Young and Bob Wilson, were authors of

some of the allegedly defamatory articles printed concerning the Petitioner (Petitioner's Exhibits Nos. 5-11).

The Vermilion County Grand Jury, on September 1977 through May 1978, heard evidence involving criminal activities of the City of Danville police officers in 1970-1971. In the late afternoon on December 20, 1978, an eight-page document entitled "Grand Jury Report" was released to the public by the trial court. (Petitioner's Exhibit #1).

The following day (December 21, 1978), Respondent's newspaper, *The Commercial News* published two articles relating to the investigation and to the Grand Jury Report (Petitioner's Exhibit #5). The headline that day was:

"GRAND JURY DESCRIBES POLICE BURGLARY SETUP"

Immediately below the headline were pictures of Petitioner and five other persons.

The caption under the picture of Petitioner and two other officers was:

"CURRENT OFFICERS IMPLICATED IN REPORT"

==========

"FOUR CURRENT LAW OFFICERS-ARNOLD YANDERS, ROBERT TESTA, MICHAEL REED AND KENNETH COX WERE NAMED BY GRAND JURY WITNESSES AS JOINING IN AT LEAST ONE OR A FEW OF THE REPORTED BREAK-INS BY POLICEMEN. .."(Petitioner's Exhibit #5).

Adjacent to the pictures and below the headlines was an article authored by the Respondent, Bob Wilson. That article asserted *inter alia* that:

"(1) The Grand Jury investigation determined that up to ten police officers were involved in break-ins . . . . according to the report." (Column 1, Page 1: Petitioner's Exhibit #5).

"(2) The "usual practice" according to the Grand Jury testimony of a former policeman identified as one of the ring leaders was to split whatever was taken among the patrolmen on the scene." (Column 1, Page 1: Petitioner's Exhibit #5).

"(3) At least three (of the officers involved in the burglaries) remain on the department . . ." (Column 1, Page 1: Petitioner's Exhibit #5).

"(4) Massey, Roland and other witnesses at the Grand Jury sessions identified other officers involved, too.
They included former policemen Jerry Hill and Richard Moody and current officers Sgt. Robert Testa, Patrolman Arnold Yanders, Patrolman Mike Reed and former Patrolman Kenneth Cox, who is now a county deputy." (Column 1, Page 2: Petitioner's Exhibit #5).

"(5) Massey also was at Harding's break-in on August 25, 1971, he said, and saw Roland, Hill and Cox removing watches and electric shavers from a display after they responded to a supposed burglary call.

Lt. Edwin McGhee also testified about the Harding's incident, saying he came on the scene and found Hill, Roland, Massey and Officer Mike Reed inside but without their flashlights turned on.

McGhee, who headed the internal investigation at the time, said that when he entered the store no watches or shavers were missing from the display but that Hill's burglary report filed the next day listed them among the missing items." (Columns 2 and 3, Page 2: Petitioner's Exhibit #5).

The newspaper article did not state what the Grand Jury Report stated. The Report mentions Mike Reed's name twice, on Page 4 and on Page 6. On neither occasion is there an allegation in the Grand Jury Report of specific wrongdoing by Michael Reed. (Petitioner's Exhibit #1).

The Grand Jury Report does not support the assertions set forth as Items Nos. 1 through 5 above. These assertions are incorrect and false.

Thereafter on December 22, 1978, Respondent Wilson alleged in Respondents' newspaper that:

> "Four former policemen-Jack Roland, Richard Massey, Jerry Hill and Richard Moody-were named as participants in break-ins and thefts, as were three current city policemen-Arnold Yanders, Robert Testa and Michael Reed-and one who has since become a county sheriff's deputy, Kenneth Cox." (Column 1, Page 1, : Petitioner's Exhibit #6).

Respondent Wilson, in the articles authored by him on December 23, 1978, further

related the matters concerning the Grand Jury Report and accused Michael Reed as follows:

> "The Report . . . concluded there was enough evidence to show that at least eight officers directly participated in at least 14 break-ins at local stores, gas stations, the American Legion Post 210 and the Elks Country Club. Three officers still with the department-Robert Testa, Arnold Yanders, and Michael Reed-were named as participants in one or more incidents." (Columns 2 and 3, Page 1: Petitioner's Exhibit #7).

Thus, in each one of the newspapers of December 21, 22, and 23, 1978 Michael Reed was described in the articles and captions under his picture as being a burglar.

Each one of the accusations directed against Michael Reed was claimed to be based on the Grand Jury Report. The Grand Jury Report does not state that Michael Reed was a burglar. The Report states that "most of the officers named as being directly involved in the crimes of burglary and theft have left the Danville Police Department" but that "several officers

having direct knowledge of police misconduct and peripheral involvement therein are still employed as Danville Police Officers" (Petitioner's Exhibit #1). The Report mentions Reed only twice as stated above and never refers to him as joining in any break-ins.

In his testimony, Respondent Wilson stated that upon seeing and reading the first article (published on December 21, 1978), he felt uncomfortable "with the paper, picture and captions" (T. 77-78). Wilson testified that his feeling of discomfort related particularly to the caption under Reed's picture which stated that Reed was implicated or joined in at least one of a few reported break-ins (T. 79). Wilson did not inform anyone that he was concerned about Reed's involvement, did not change his article and continued to make the allegations that Reed was a burglar in his articles published on December 22 and December 23, 1978 in spite of his concern about the accuracy

of the characterization of Reed in the publication of December 21 (T. 81-82).

Prior to its receipt of the Grand Jury Report, the newspaper, its editor and and its city editor had knowledge of specific names of persons involved in the police burglary ring and had knowledge of specific occurrences of wrongdoing by policemen. On December 21, 1978 in Respondent's newspaper on Page 9 under the heading "Prosecutors: C-N Played Role In Investigation," it was stated:

> "Craig DeArmond, who helped present information to the Grand Jury, said specific names and occurrences supplied by C-N reporters more than a year ago helped provide a framework for prosecutors to present information to the grand jury." (Petitioner's Exhibit #5).

An article in *The Commercial News* on September 8, 1977 stated: " that as many as seven former or present Danville police officers may have been involved in committing burglaries" and further reported "sources said seven past and present police officers are

suspected of the burglaries. . . ." The Grand Jury Report implicates seven officers as being participants in the burglary ring. Randy Kirk, the editor of *The Commercial News,* stated that on December 21, 1978, prior to the paper's publication, he told his staff he thought the Grand Jury was reporting that six or seven officers were involved in the burglary ring (T. 177). In spite of this statement and in spite of the knowledge that the Respondents had prior to December 21, 1978 that only 7 officers had been implicated, it was reported by Respondents on December 21, 1978 in the first page of the paper that there were eight such officers, pictures of six of whom (including Petitioner) were prominently displayed on the front page on that date.

Prior to the publication of the offending articles, editor Randy Kirk knew of the investigation that had been made by his reporters. These reporters, Dan Olmstead and Les Smith, both knew that there were sources

which were naming names (T. 166-167). Through this period of time, Mike Reed's name was not named (T. 171-172), and the reporter (either Dan Olmstead or Les Smith) had a copy of the investigation that had been prepared by the source or by others in 1971 (T. 164-166). At the time of the publication on December 21, 1978 the editor stated that he was concerned with Mike Reed being named as a participant because "there was not enough detail what his involvement was as far as the Grand Jury was concerned" (T. 180). In spite of the knowledge and this concern he permitted the paper to be published. (T-171-181)

After the publications of December 21, 22, and 23, there were subsequent publications by Respondent, *The Commercial News*, authored by Respondent, Carl Young. The first such publication appeared on March 6, 1979 (Petitioner's Exhibit #8) and stated as follows:

"However, a City Hall source said those taking the lie detector tests 'presumably' will include three city officers who were alleged by the grand jury to have burglarized city stores." (Petitioner's Exhibit #8).

"The report said three of the officers were still on the Danville police force. . .." (Petitioner's Exhibit #8).

The next publication by Respondents and by Carl Young, in *The Commercial News* appeared on March 10, 1979 (Petitioner's Exhibit #9), and stated:

"A seven-page summary of the . . . grand jury testimony . . . named three current officers . . . as participants in at least one of the 1970-71 break-ins." (Column 3: Petitioner's Exhibit #9,).

On March 28, 1979, an article in *The Commercial News* authored by Carl Young again stated:

"The officers were ordered to take the tests as part of a city investigation of grand jury allegations that three current city officers were involved in a burglary ring within the department in 1970-71." (Column 1: Petitioner's Exhibit #10).

On March 29, 1979, the Respondent, *The Commercial News*, published another article authored by Respondent, Carl Young:

> "A grand jury report named three current city officers as participants in an alleged burglary ring that supposedly operated within the Danville Police Department in 1970-71.
>
> The city ordered seven city officers, including the three named in the grand jury report, to take lie detector tests based on testimony given to the Grand Jury." (Petitioner's Exhibit #11).

Carl Young admitted to having read the story on December 21, 1978 (T. 205). He had read the captions underneath the pictures of the current officers and had read the Report, but he did not make an analysis of what the articles said or what was in the report about Mike Reed either on that day or on the 22nd or 23rd of December (T. 205-211). The other articles authored by Carl Young occurred two to three months after these events.

The above mentioned evidence was presented to the jury. The day following the jury verdict the Respondent newspaper reported an interview with the jury foreman in which the jury foreman stated:

> "Our general feeling was that the C-N hurried its decision on writing an article on the grand jury report but by law the Petitioner did not prove that the reporter actually wanted to malign Mr. Reed."

A post-trial motion was filed by the Petitioner on July 24, 1986. The court denied the this motion on October 16, 1986. The Fourth District Appellate Court affirmed the trial court's decision on August 24, 1987. (A. 65). The Supreme Court of Illinois affirmed the decision of the appellate court and upheld the jury verdict. (A.1)

ARGUMENT

THE COURT SHOULD GRANT THIS WRIT OF CERTIORARI AND DETERMINE WHETHER A POLICEMAN OF THE LOWEST RANK IS A PUBLIC OFFICIAL FOR PURPOSES OF NEW YORK TIMES v. SULLIVAN.

In the 1964 decision of **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), this Court held that, in order to recover for libel, a "public official" who was criticized in his official conduct must show with convincing clarity that the Respondent .acted with actual malice. In so doing, the Court safeguarded against excessive self-censorship, thus eliminating the "pall of fear and timidity imposed upon those who would give voice to public criticism, an atmosphere in which First Amendment free-

doms cannot survive" (376 U.S. at 278). Excessive self-censorship is obviously harmful in a system of popular sovereignty. However, the Court undoubtedly realized that society also has a responsibility to protect an individual's reputation. Thus, the Court applied the stringent **New York Times** requirements only within the boundaries of "public officialdom."

The Court in **New York Times** did not define the term "public official," declined to answer in detail the question of how far down into the lower ranks of government employees the "public official" designation would extend for purposes of the rule, did not specify categories of persons who would or would not be included and did not determine the boundaries of the official conduct concept (376 U.S at 283 note 23).

An examination of the precedents relied upon by the Court in **New York Times** provides some guidance concerning the scope of the "public official" concept. None of the

decisions relied upon involved lower echelon public employees. The precedents relied upon in **New York Times** included only individuals with positions of substantial actual or potential influence in the political arena (candidates for public office, a United States Congressman, members of the judiciary, high ranking police and military officers and federal and state executive officials of significant policy making authority).

In the decades following **New York Times**, a number of decisions have hinged upon exactly "how far down into the lower ranks of government employees that 'public official' designation would extend" (376 U.S. at 283 note 23). It is submitted that a number of lower courts have misinterpreted both **New York Times** and subsequent Supreme Court rulings by placing the lower echelons of government employees under the rubric of "public officials." Specifically, it is submitted that Mr. Reed, serving as an ordinary beat police-

man, should not be subject to the stringent **New York Times** requirements.

In 1966, two years after **New York Times**, this Court in **Rosenblatt v. Baer**, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) was confronted with the question of how far down into the lower ranks of government employees the public official designation would extend. In **Rosenblatt** the Court rejected the suggestion that reference to state law standards would be controlling, and the Court attempted to delineate general federal guidelines for determination of "public official" status, noting that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation" (383 U.S. at 86). A concurring Justice Stewart emphasized this point by stating:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being---a concept at

> the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of a constitutional system" (383 U.S. at 92).

Although the Court recognized the need to protect an individual's reputation, it also acknowledged a "tension between this interest and the values nurtured by the First and Fourteenth Amendments" (383 U.S. at 86). Thus, the **Rosenblatt** Court attempted to set general guidelines for determining what types of government employees qualify as "public officials." With respect to the exact line of demarcation between the "public official" and the ordinary citizen, the Court stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the

conduct of governmental affairs" (383 U.S. at 85).

In addition, the Court stated:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in **New York Times** are present and the **New York Times** malice standards apply" (383 U.S. at 86).

The Court specifically rebutted the contention of concurring Justice Douglas that the key man in a government hierarchy might be a night watchman accused of taking state secrets and disregarded the notion advanced by Justice Douglas that such a lower echelon employee should be required to comply with the **New York Times** criteria.

The conclusion of **Rosenblatt** was that in applying the general criteria of **New York Times** "that Rosenblatt may have held such a position of public official" but the Court did not hold that he fell within the public official

classification. Rather the Court determined that it was a matter for the trial judge upon remand in the first instance to determine whether the proof showed that the Petitioner was a "public official". It is submitted that this is a burden for the Respondent to sustain and to show that the case is within the **New York Times** standard. If the Respondent sustains that burden of proving public official status and thus the privilege granted by **New York Times,** then the Petitioner has the burden of proving the privilege was abused. In the instant case there was no determination by the trial court in the first instance on the facts of this case that the Petitioner was a public official but it instead determined, as a matter of law, that the Petitioner was a public official. It is submitted that the Respondent in the instant case had the burden of proving the presence of the circumstances necessary to establish "public official" status and the existence of a privilege to publish the

defamatory communication. It was made clear in **Rosenblatt** that the question whether a person is a public official is to be determined not by state law standards but by standards announced by the U.S. Supreme Court. In the instant case it was incumbent on the trial court to find, by fact intensive analysis, that this Petitioner was a public official based on one of the alternative tests of **Rosenblatt.**

In 1974, the Supreme Court addressed the question of the extent to which **New York Times** can be applied to private individuals. In **Gertz v. Robert Welch, Inc.** 418 U.S. 323, 94 S. Ct . 2997, 41 L .Ed. 2d 789 (1974), the Court conceded that the **New York Times** standard "exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving Petitioners, including some intentionally subjected to injury, will be unable to surmount the barrier of the **New York Times** test"(418 U.S. at 342). This led the Court to reject the **Rosenbloom v. Metromedia, Inc.**,

403 U. S. 29, 29 L.Ed. 296, 91 S.Ct. 1811 (1971) plurality extension of **New York Times** to matters of "public or general interest." The Court delineated a distinctive difference between public and private persons:

> "The first remedy of any victim is self-help --- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (**Gertz,** 418 U.S. at 344).

The Court concluded that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery"(418 U.S. at 345).

The Illinois Supreme Court in the instant case affired its decision in **Coursey v. Greater Niles Township Publishing** Cor-

poration, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968) wherein it was stated:

> "It is our opinion that the Petitioner is within the 'public official' classification. Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly governmental in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers even at, and perhaps especially at, 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed toward the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws." (239 N.E. 2d at 841).

It is submitted that the course of treatment of the concept "public officials" by this Court would dictate that the "public official" definition for purposes of the constitutionally

prescribed standard of defamation would not apply to a patrolman as a matter of law. The concept of "public official" is not based on whether or not the public official is performing a "primary function of local government" as oposed to whether it is a "proprietary function," nor does the "great potentiality for social harm" fit within the standards announced in **Rosenblatt**. The question is: Does the official have substantial responsibility for or control over governmental affairs? The answer to that question in the instant case is "No".

In a 1979 decision this court again rejected the notion of an all encompassing "public official" status. **Hutchinson v. Proxmire,** 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979) cast doubt on how pervasively the term "public official" is to be construed. Hutchinson was Director of Research at the Kalamazoo State Mental Hospital, and was a state employee. He had also been an

adjunct professor at Western Michigan University. This Court noted:

> "The District Court also concluded that Hutchinson was a 'public official.' 431 F.2d at 1327-1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F.2d 1027, 1035 N. 14 (C. A. 7, 1978). We therefore express no opinion on the issue. The court has not provided precise boundaries for the category of 'public official,' and cannot be thought to include all public employees, however." (443 U.S. at 119 note 8).

This Court thereby again explicitly rejected the notion that mere public employment is synonymous with public official status.

From **New York Times** up through **Hutchinson** this Court has refuted any suggestion that any and all government employees from the highest to the lowest echelons of governmental employment warrant treatment as "public officials". The severe incursions on a public employee's rights to redress for injury to his reputation should not apply to each and every public official. It is noteworthy that

this Court has, on three occasions, rejected the suggestion that the merest governmental connection suffices for "public official" status - its night watchman analysis in **Rosenblatt,** its rejection of an attorney-officer of the court as a public official in **Gertz** and its footnote 8 in **Hutchinson**. It is also noteworthy that the Supreme Court has not held anyone as low ranking as a policeman to be a public official. In **Time, Inc. v. Pape**, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971) the Court accepted, without deciding, the lower courts' determination that a deputy chief of detectives of the Chicago Police Department was a public official.

In **St. Amant v. Thompson**, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), only one member of the Court denominated the deputy sheriff as a "public official." The Court, however, adopted for "purposes of this case only" the Louisiana court's determination that a parish sheriff was a "public official."

Although this Court has repeatedly rejected the notion of an all-encompassing public officialdom, a number of lower courts have ignored or misinterpreted the aforementioned caveats of **Rosenblatt** and **Hutchinson**. A number of these courts have followed the rationale of **Coursey v. Greater Niles Township Publishing Corporation**, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968) by extending "public official" status to the lower echelons of law enforcement officers. This Court has not yet placed "lower-level" employees under the rubric of "public officials." The course of treatment of the concept "public officials" by this Court would seem to dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman. This Court has consistently rejected the notion that all government employees should be subjected to the stringent **New York Times** burdens. "'Footnote thirteen' of **Rosenblatt**

constitutes a pivotal element in this delicate balancing of the competing interests of reputation and free expression involved in the determination of status issues" (See Elder, **Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria**, 33 Buffalo Law Review 579, 667).

It is submitted that implicit in the reasoning of **New York Times Co. v. Sullivan** is the concept that the governed must have the unbridled freedom to question the governor, and that those who are influenced by the operation of government must be able to freely criticize those who control the conduct of government. The lowly patrolman (in this case a rookie patrolman at the time when the reported events took place) is far too remote from the decision making processes of government to justify exposing him to a privileged assault upon his or her reputation. Nor does the lowly patrolman have the ability or the resources or the forums from which to speak to contradict

the alleged libel. His position in that regard is not at all analogous to the governor of a state or a mayor of a city who have the forums from which to contradict the alleged libel and the ability to use those forums. In this case the Petitioner, by written police department regulation, was prohibited from speaking out on any issues involving the police department

It is submitted that the carefully balanced position taken in **Rosenblatt** must be read with the all encompassing view thereafter expressed in **Rosenblum v. Metromedia,** 403 U.S. 29, 29 L.Ed.2d 296, 91 S. Ct. 811 (1971), which was thereafter rejected in **Gertz. v. Robert Welch, Inc.**, 418 U.S.323, 41 L.Ed.2d 789, 94 S. Ct. 2997 (1974). This Court has given recognition to an equitable and fundamentally fair compromise between inherently competing and inconsistent interests. The first interest is to protect the First Amendment rights of those persons who oppose individuals with actual or potential power over

the conduct of governmental matters. Those individuals - "public officials" - who are in the position to influence the decision making processes relinquish appreciably their claim to protection of their basic interest in reputation. The other interest at stake is the interest in personal reputation. This Court seems to have granted approximate parity to the two interests, treating the interest in reputation as an equally compelling need which must not be subjected to substantial depreciation.

It is submitted that this Court should determine that there is a group of public employees who are "public officials" as a matter of law - such as all elected officials, high placed appointed officials, etc. There is also a group of public employees who should be declared not to be "public officials," such as the court house janitor, the 'night watchman, the jailer and a whole host of other lower echelon public employees - including the ordinary beat policeman. The analysis in **Gertz**

would more appropriately apply to the ordinary beat policeman than to the person who has substantial responsibility for the conduct of government affairs. There is also a group of public employees who should be tested in each individual case as to whether they are "public officials" as a matter of fact. There are no facts in the record that show the Petitioner had substantial responsibility for the conduct of government affairs or in any way held a position sufficient to meet the **New York Times** tests of a "public official."

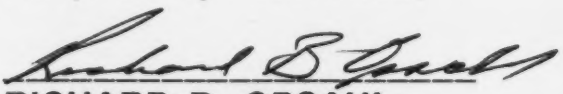
X

CONCLUSION

For the reasons stated herein Petitioner submits that he, as a mere patrol officer, is not a public official as contemplated by this Court in **New York Times Co. v. Sullivan** and its progeny.

This Court should issue its Writ of Certiorari to the Supreme Court of Illinois to reverse that Court's judgment and remand the case for such further proceedings as may be consistent with this Court's ruling that Petitioner is not a public official within the meaning of **New York Times Co. v. Sullivan**.

Respectfully submitted,



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88-1224

Supreme Court, U.S.
FILED
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CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL REED,

Petitioner,

v.

NORTHWESTERN PUBLISHING COMPANY, d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG,

Respondents.

APPENDIX

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APPENDIX INDEX

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(Docket No. 65876 of the Illinois Supreme Court - Judgment affirmed)

MICHAEL REED, Appellant, v. NORTHWESTERN PUBLISHING COMPANY, d/b/a The Commercial News, et. al., Appellees.

Opinion filed October 20, 1988

JUSTICE CUNNINGHAM delivered the opinion of the court:

In the circuit court of Vermilion County, plaintiff, a Danville police officer, filed this libel action against the Northwestern Publishing Company, doing business as The Commercial News (CN), and two of its reporters, Bob Wilson and Carl Young. Wilson and Young were authors of certain allegedly defamatory material concerning plaintiff appearing in CN. The circuit court initially granted defendants' motion for summary judgment, but this ruling was reversed on appeal (*Reed v. Northwestern Publishing Co.* (1984), 129 Ill.App.3d 133, and trial was held. At the close of plaintiff's case, a judgment was directed in favor of

Carl Young, and subsequently the jury found in favor of defendants CN and Bob Wilson.

Plaintiff appealed, raising substantially the same issues presented here, and the appellate court upheld the verdicts (159 Ill.App.3d 699). Pursuant to Supreme Court Rule 315 (107 Ill.2d R. 315), we granted plaintiff's petition for leave to appeal.

We shall briefly summarize the investigations of a police burglary ring which gave rise to the grand jury report and the newspaper articles involved in this action. We shall then summarize pertinent portions of the grand jury report and the newspaper articles. Next we shall analyze whether plaintiff is a "public official" for first amendment purposes. Then we shall discuss the evidence supporting the verdicts and address numerous alleged trial errors.

I. INVESTIGATIONS LEADING TO GRAND JURY REPORT

During 1970 and 1971 there were (according to testimony of Randy Kirk, city editor of CN) suspicions and rumors afloat that some police officers in the Danville area were involved in burglaries. An internal investigation was con ducted at that time through the Danville police department and the Vermilion County State's Attorney's office. However, investigators concluded at that point that insufficient evidence existed to bring charges against any officers. Some years later, in approximately 1975, CN reporters received (from undisclosed sources) some information regarding particular officers involved in some particular burglaries. CN reporters provided this information to the Vermilion County State's Attorney's office. With this information the State's Attorney's office launched a renewed investigation, which eventually led to an investigation by the grand jury.

The grand jury first met in September 1977 to investigate the alleged burglary ring. CN staff writers Les Smith and Dan Olmstead reported the

fact of this meeting in CN's September 8, 1978, edition (an article not directly in issue here), stating that the grand jury probe related to suspicions that "as many as seven former or present Danville police officers" may have been involved in burglaries.

The grand jury meetings occurred numerous times, concluding in 1978. Several officers who were alleged to have been involved in some of the burglaries were granted immunity from prosecution in return for their grand jury testimony. Other current and former officers were also called to testify.

II. CONTENTS OF GRAND JURY REPORT

At the conclusion of its investigation, the grand jury submitted to Vermilion County Circuit Judge James Robinson a seven-page report (drafted by then Assistant State's Attorney Craig DeArmond). The grand jury requested that the report be made public, and the report was released on December 20, 1978.

According to the grand jury report, 34 unsolved burglaries were committed in Danville in 1970 and 1971. The report noted that during 1970 and 1971 a series of suspicious burglaries attracted the attention of several ranking officers, and that during this time 37 burglaries were reported, of which only three were solved or cleared by arrest. The remaining 34 burglaries, according to the report, were all discovered by one of four officers, each of whom was either on patrol duty during a night shift or was voluntary accompanying his colleagues on such patrol. The burglaries all occurred at night, and the targets were all commercial establishments. The report listed 14 particular burglaries for which the grand jury had received evidence.

The grand jury report refers to plaintiff twice. The first reference is in a summary of the testimony of Officer Joseph Miller, who at all relevant times worked for the Danville police department. Miller had participated in an internal investigation of the suspected misconduct, and the

grand jury report summarizes his testimony regarding a burglary of the local American Legion Hall as follows:

"Officer Miller described the Legion burglary of December 21, 1970 and how [Officer] Massey had fortuitously discovered an open window, failed to call it in, met with Officer Hill and returned to the Legion, leaving Miller posted outside. Miller testified that Massey had previously questioned him concerning whether upon finding a place broken into, would he accept something taken by officers[.] Massey also asked him what his favorite liquor was; to which Miller replied, 'Scotch'. After all officers who initially responded; including: Calvin Norman, Jerry Hill, Jack Roland and Michael Reed, had left, the owner was called to check out the premises. When they left the scene Officer Miller found a bottle of Scotch under his side of the seat in their squad car."

The grand jury report also refers to plaintiff in summarizing the testimony of Lieutenant Edwin McGee, who, like Miller, had participated in the police department's internal investigation. The grand jury report states:

> "Lieutenant Edwin McGee testified as to his responding to the August 25, 1971 burglary at Harding's Pharmacy where he found Officers Hill and Reed at the scene with Roland and Massey showing up later. His investigation of the scene, specifically including the watch case and shaver display showed nothing to be missing or disturbed, however, when he read the report submitted the next day by Hill, it showed watches, shavers and radios to have been taken along with a large amount of cash."

The report states that a grand jury investigation should have been conducted years earlier. The report states that the limitations period had run

regarding the burglary offenses and that officers could thus not be prosecuted for their participation in the offenses. The report concludes that there "is no indication that the situation as it existed in 1970 and 1971 exists today."

III. CONTENTS OF POST-REPORT NEWSPAPER ARTICLES

On December 21, 1978, the day following the release of the grand jury report, CN published four articles relating to the burglary ring, two of which articles appeared on the front page and are directly in issue here as being allegedly libelous. One such allegedly libelous article (under Bob Wilson's by-line) is entitled, "Grand Jury Describes Policy Burglary Setup." It contains pictures of plaintiff and several other officers above the caption, "Current Officers Implicated in Report." Beneath the caption is the statement, "Four current law officers--Arnold Yanders, Robert Testa, Michael Reed and Kenneth Cox--were named by grand jury

witnesses as joining in at least one or a few of the reported break-ins by policemen." The article itself states that the grand jury's investigation "determined that up to 10 police officers were involved in the break-ins." The article also states, "The 'usual practice', according to the grand jury testimony of a former policeman identified as one of the ring-leaders, was to split whatever was taken among the patrolmen on the scene." The article also states that certain officers had admitted involvement in certain burglaries , and the article further states, "[The witnesses] identified other officers involved too. They included *** Patrolman Mike Reed ***." Later the article states, "Lieutenant Edwin McGee also testified about the Harding's incident, saying he came on the scene and found Hill, Roland, Massey and Officer Mike Reed inside but without their flashlights turned on."

The other December 21 article (containing no by-line but admittedly contributed to by Carl Young) is entitled, "3 Deny Roles in Burglaries,"

refers to Reed as one of the officers "implicated" and quotes him as denying any involvement.

On December 22 a follow-up article by Bob Wilson was published, again mentioning plaintiff as one of the officers "implicated." This article focuses on the possibility of criminal or disciplinary charges against the officers and is entitled, "Next Move Weighed in Burglary Ring Case." Plaintiff did not base any cause of action on this article but apparently introduced it as evidence that in publishing other articles Wilson and CN acted with malice.

A December 23, 1978, allegedly libelous article by Bob Wilson also discusses the possible action against the officers and again lists Mike Reed as one of the current officers "named as participants in one or more incident."

On March 6, 1979, CN published another allegedly libelous article written by then staff writer Carl Young. This article is entitled, "Policemen Face Choice: Take Lie Detector Tests or be Fired." The article does not mention particular officers by

name but states that "the grand jury *** reported that up to 10 police officers *** were involved in break-ins at local service stations and stores in 1970-71." The article goes on to state that "the report said 3 of the officers were still on the Danville police force." The assertion either that three current officers had been implicated in a burglary ring or that three current officers had been implicated in at least one of the break-ins is again made in an allegedly libelous article written by Carl Young, appearing on March 10, 1979, and in two allegedly libelous articles appearing on March 28, 1979, and March 29, 1979, respectively, neither of which contains a by-line.

On April 6, 1979, CN published an article by Carl Young summarizing the results of the lie detector tests. The article states in part:

> "Officers Mike Reed and Joseph Miller took the tests and passed, [Mayor David] Palmer said. No disciplinary action will be taken against them, he said.

'Although he (Reed) was named in the the grand jury report, we could find absolutely no evidence of wrongdoing on his part,' Palmer said. He said there was 'absolutely' no evidence of wrongdoing on the part of Miller."

Plaintiff wanted this article admitted on the question of malice, but defendants objected to the article on relevance grounds and it was excluded.

CN published several articles covering the progress of the instant libel action. Plaintiff sought to have these articles admitted as indicating prior malice, but these articles were refused as irrelevant.

IV. PLAINTIFF IS A PUBLIC OFFICIAL

The United States Supreme Court has emphasized that erroneous statements are inevitable in free debate, and that such statements must be afforded some protection if freedoms of expression are to have the "breathing space" which they need

to survive. (*New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 272-73, 11 L. Ed. 2d 686, 701-02, 84 S. Ct. 710, 721-22.) To afford this "breathing space" to public debate, the United States Supreme Court has held that a "public official" seeking to recover for libel with respect to comments involving his official conduct must prove that the statements were made with "actual malice," that is, with knowledge that the statements were false or with reckless disregard of whether the statements were false. 376 U.S. at 279-80, 11 L. Ed. 2d at 706, 84 S. Ct. at 726.

Following the *New York Times* decision, the Supreme Court in *Rosenblatt v. Baer* (1966), 383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669, had occasion to discuss the meaning of the term "public official." The Court stated that the "designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." (383 U.S. at 85, 15 L. Ed.

2d at 605, 86 S. Ct. at 676.) The Court further stated that the designation applies "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." 383 U.S. at 86, 15 L. Ed. 2d at 606, 86 S. Ct. at 676.

This court had occasion to apply the definition of "public official" in *Coursey v. Greater Niles Township Publishing Corp.* (1968), 40 Ill. 2d 257, in which a police officer sought damages for allegedly libelous statements. We found that the officer was a public official, stating:

> "Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law

enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws." 40 Ill. 2d at 265.

Plaintiff has asked us to reconsider our decision in *Coursey*. He submits that this court erroneously applied the "public official" designation as that term has been interpreted by the United States Supreme Court. He argues that a police officer neither has nor appears to have

substantial responsibility for or control over government affairs. He further indicates that the public does not take an interest in the qualifications and performance of a police officer except when he becomes involved in a particular controversy.

Plaintiff also directs our attention to the comment in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997, that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally do." (418 U.S. at 344, 41 L. Ed. 2d at 808, 94 S. Ct. at 3009.) Plaintiff submits that a police officer does not have such access to the press and that therefore part of the rationale for designating an individual a "public official" is inapplicable here.

Plaintiff also argues that "the Supreme Court has not held that anyone as low ranking as a policeman or as a teacher is a public official," and suggests that the designation applies only to higher-

ranking employees. The status of a teacher is not at issue here, and we do not comment on such status. As his argument applies to the status of a police officer, however, we agree with the observation in *McLain v. Arnold* (1980), 275 S.C. 287, 270 S.E.2d 124, where the court stated, "[S]imply speaking, the status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." 275 S.C. at ____, 270 S.E.2d at 125.

We adhere to our conclusion in *Coursey* that a police officer is a public official. In this regard we initially disagree with plaintiff's conclusion that police officers lack greater access to the press than do members of the general public. Moreover, access to the press is not the test in determining whether a person is a public official, but is merely an advantage enjoyed by many public officials. As noted by Justice Powell in *Gertz*, 418 U.S. at 344,

41 L. Ed. 2d at 807, 94 S. Ct. at 3009, "it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority."

Further, it is significant that in the 20 years since the *Coursey* decision was rendered, countless decisions throughout the country have addressed the issue, and none to our knowledge has held to the contrary. (Several courts, however, have indicated that certain libelous statements were unrelated to an officer's official conduct and were therefore not qualifiedly privileged. See, e.g. *Himango v. Prime Time Broadcasting, Inc.* (1984), 37 Wash. App. 259, 680 P.2d 432; *Tilton v. Cowles Publishing Co.* (1969), 70 Wash. 2d 707, 459 P.2d 8.)

The cases deeming a police officer a public official are based on sound reasoning. For example, we find particularly insightful *Gray v. Udevitz* (10th Cir. 1981), 656 F.2d 588, 591, in which the court stated:

"The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant[s] the conclusion that he is a public official."

In accord with *Gray* is *Moriarity v. Lippe* (1972), 162 Conn. 371, 378, 294 A.2d 326, 330-31, in which the court pointed out that "[a]lthough a comparatively low-ranking government official, a patrolman's office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position." Also on point is *Smith v. Russell* (Fla. 1984), 456 So. 2d 462,

464, in which the court found that a police officer was a public official and stated:

> "The plaintiff is a highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power. There are probably no public employees more recognizable than armed uniformed police officers. Most citizens are interested [in police officers' qualifications] beyond their general interest in the qualifications and performance of all government employees."

We also find persuasive *Roche v. Egan* (Me. 1981), 433 A.2d 757, 762, in which the court observed:

> "Law enforcement is a uniquely governmental affair. The police detective, as one charged with investigating crimes and arresting the criminal, is in fact, and also is generally

known to be, vested with substantial responsibility for the safety and welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets. The nature and extent of the responsibility of a police detective is punctuated by the fact that a firearm, no less than a badge, comes with his office."

Plaintiff submits that courts should determine that, for purposes of applying the public official designation, there are three groups of public employees. He submits that (1) employees in certain positions can as a matter of law be deemed public officials, (2) some are as a matter of law not public officials, and (3) others should be tested by a "fact intensive analysis" on a case-by-case basis as to whether they are public officials as a matter of fact. Arguing that he falls into the third category, he submits that there is no evidence in the record to indicate that he himself is a public official.

In *Rosenblatt v. Baer* (1966), 383 U.S. 75, 88, 15 L. Ed. 2d 597, 606, 86 S. Ct. 669, 677, the Court held that "it is for the trial judge in the first instance to determine whether the proofs show respondent [a supervisor of a county recreation area] to be a 'public official.'" The Court noted that "[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and to assure an appellate court the record and findings required for review of constitutional decisions." 383 U.S. at 88 n.15, 15 L. Ed. 2d at 607 n.15, 86 S. Ct. at 677 n.15.

Although we do not question that there may well be governmental employees whose positions require the extensive "fact intensive analysis" which plaintiff requests, the United States Supreme Court clearly has not required this with respect to those government positions the duties of which are widely recognized. Indeed, in the landmark decision of *New York Times*, the Court relied not on a detailed exposition of the plaintiff's duties but

on the fact that his duties were generally the supervision of certain city departments. (*New York Times*, 376 U.S. at 256, 11 L. Ed. 2d at 692, 84 S. Ct. at 713.) We note also that the numerous decisions discussed above which have found a police officer to be a public official did so not on the basis of duties unique to that plaintiff but on the basis of duties of police officers generally. We further note that, as recognized in *Belli v. Orlando Daily Newspaper, Inc.* (5th Cir. 1967), 389 F.2d 579, 588, "[i]n most cases it is a relatively simple matter to determine whether the plaintiff is a public *official* and whether the defamatory comment is directed toward his *official* capacity." (Emphasis in original.) We note that plaintiff testified at trial regarding his job duties, and we hold that in the absence of any indication that plaintiff did not perform the ordinary and customary duties of a beat police officer, it was appropriate for the circuit court to conclude that he was a public official.

V. THE VERDICTS WERE WARRANTED BY

THE EVIDENCE

The circuit court directed a verdict in favor of Carl Young due to an insufficiency of evidence of actual malice on his part. Having been directed that Carl Young acted without malice, the jury was required to consider the alleged malice of only Bob Wilson and the corporate defendant. The jury found (in special interrogatories) that no such malice existed with respect to either the December 21, 1978, article with Bob Wilson's by-line, the captions and pictures accompanying that article, the December 23, 1978, article, the March 6, 1979, article, the March 28, 1979, article, or the March 29, 1979, article.

A. Directed Verdict for Carl Young

The United States Supreme Court has held that a ruling on a motion for a directed verdict or summary judgment "necessarily implicates the substantive evidentiary standard of proof that

would apply at the trial on the merits." (*Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 252, 91 L. Ed. 2d 202, 214, 106 S. Ct. 2505, 2512.) While *Anderson* was applying the Federal Rules of Civil Procedure, its observation was equally applicable to actions in State court. With respect to libel claims brought by public officials relating to their official conduct, the first amendment "mandates a 'clear and convincing' standard, [and] the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity." 477 U.S. at 252, 91 L. Ed. 2d at 214, 106 S. Ct. at 2512.

Plaintiff fell far short of establishing with convincing clarity that Carl Young's role in publishing any articles at issue involved "actual malice." His role in one of the December 21, 1978, articles (the article containing no by-line) was peripheral at most. His testimony indicates that he was asked to call and obtain statements from one or

more officers mentioned in the report. He remembers calling only one officer. He does not recollect calling Officer Reed, and there is no testimony in the record that he did so. (Reed does not remember who from CN called him.) Carl Young remembers typing his notes of these conversations and believes that he gave the notes to Les Smith. Carl Young does not know whether Les Smith actually wrote the article. Although Carl Young had by this point "glanced at" the grand jury report mentioning Reed, there is no indication that he had studied the report at any length. Rather, a fair reading of his testimony indicates that he was busy that day preparing his "scanner" (police beat) report, was asked to call one or more officers, hurriedly did so and made notes of his conversations, and then returned to his other duties. If the burden of proof in this case were less than it is, then plaintiff would perhaps have a better argument that the motion for a directed verdict should have been denied. However, after reading the record, we, like the circuit court, fail to see

how a reasonable jury could find that plaintiff had established with clear and convincing evidence that on December 21, 1978, Carl Young wrote that Reed was implicated in the report. There is even less evidence that Young made such a statement while actually entertaining serious doubts as to the truth of the assertion.

The second article about which Carl Young's involvement was questioned appeared on March 6, 1979. That articles contains the following language:

> "A seven page summary of the usually secret grand jury testimony was released to the public, and it named three current officers and one sheriff's deputy as participants in at least one of the 1970-71 break-ins."

Although Carl Young stated that he "probably" read the grand jury report between the time that the December articles were published and the time that this article was published, he stated that he based

the above-quoted statement on previous stories--stories which he had little, if any, role in writing. Considering testimony that Young relied on previous stories, and considering that the report itself is extremely murky in its discussion of numerous officers, including Michael Reed (so that unless one scrutinizes the report one could very well conclude that Reed had been "implicated"), we agree with the circuit court that a jury could not reasonably find "clear and convincing evidence" that Carl Young had "a high degree of awareness" of the probable falsity of his articles.

Insufficiency of evidence with regard to malice of Carl Young is equally applicable to the other articles about which he was questioned; there simply is insufficient evidence, circumstantial or otherwise, to rise to the level of "clear and convincing" proof.

B. Verdict for Bob Wilson

Plaintiff submits that the jury's verdict in favor of Bob Wilson was against the manifest weight of the evidence. Keeping in mind the heavy burden of proof which the United States Supreme Court has imposed upon public official libel plaintiffs, we must disagree with plaintiff's assertion.

There can be no doubt that Bob Wilson failed to scrutinize the grand jury report as carefully as (one would hope) a responsible journalist would do. He even acknowledged that in the December 21, 1978, article, he had falsely asserted that a witness testified to finding Reed inside a dark, burglarized building without their flashlight on. Wilson stated that he had "mixed up some details with another break-in at another place where officers were seen inside without flashlights on." Moreover, the jury explicitly found (by special interrogatory) that Bob Wilson's December 21, 1978, article, as it relates to plaintiff, was false. We cannot, however, say that the jury's finding (also by special interrogatory) that Wilson acted

without malice is against the manifest weight of the evidence.

In this regard we again note, without disputing the jury's finding of falsity, that a less than thorough reading of the grand jury report could easily leave one with the conclusion that plaintiff was involved in some burglaries to some extent. The possibility of this happening is particularly evidenced by the testimony (in an offer of proof) of the assistant State's Attorney who drafted the report; the drafter indicated that he himself believed he was naming Reed as being "peripherally involved." We further note that, at the request of the city editor, Randy Kirk, Wilson called the State's Attorney's office and made some effort to verify his report. Wilson testified as follows in response to questioning regarding what he asked when calling the State's Attorney's office:

"A. I asked--I believe I first asked the State's Attorney, Thomas Fahey, and he referred me to Craig DeArmond since Craig DeArmond

conducted the grand jury and authored the report.

Q. What conversation did you have with Mr. DeArmond?

A. I asked Mr. DeArmond what it meant to have these--for these officers names to be included in this report.

Q: What did he indicate to you?

A. He said that those officers, unless their roles are otherwise spelled out, were those officers identified by two or more witnesses placed at the scene of two or more of these police burglaries.

Q. Did he indicate to you that they were involved?

A. Not in--not each one as to their specific acts."

Although this testimony does not indicate a thorough investigation on Wilson's part, it certainly weakens the assertion that when writing the article he entertained serious doubts as to its accuracy.

Plaintiff argues, however, that actual malice is clear from certain additional evidence. In this regard plaintiff points out that Wilson acknowledged looking at the log of grand jury witnesses in September 1977, when the grand jury was first convening regarding the alleged burglary ring. Plaintiff apparently deems this relevant because the grand jury report states that the accused officers were given the opportunity to testify. Plaintiff seemingly argues that Wilson must have recognized that Reed was not an accused officer since his name did not appear on the list of grand jury witnesses. We find this argument unpersuasive for several reasons. First, the grand jury met on numerous occasions after September

1977; the absence of Reed's name from a witness list in September does not exclude the possibility that he was later called as a witness. Second, one can hardly conclude that the reporter recalled the names on that log when reading the grand jury report 15 months later. Nor does evidence that he had previously heard certain officers named as being involved (and had not heard Reed implicated) indicate that, after reading the grand jury report and calling the State's Attorney's office, he subsequently seriously doubted that the grand jury report implicated Reed. Finally, contrary to plaintiff's assertion, the fact that in attempting to meet a press deadline Wilson spent only about three hours writing the article does not necessitate a conclusion that he seriously doubted its accuracy.

With respect to the December 23, 1978, article authored by Bob Wilson (an article which the jury found was also false as to plaintiff), we agree that Wilson's failure to reread the grand jury report evinces some carelessness, but we cannot say that

as a matter of law this failure requires a finding of actual malice.

C. Verdict for CN

Having established that the jury's verdict in favor of Bob Wilson is supportable and that the directed verdict in favor of Carl Young was proper, we next turn to the contention that the jury's verdict in favor of the corporate defendant, CN, was against the manifest weight of the evidence.

A corporation's liability for slander or libel is based on the doctrine of *respondeat superior*; a corporation is jointly and severally liable for libelous statements actionable against its employee when the employee is acting within the scope of his employment. (*Windsor Lake, Inc. v. WROK* (1968), 94 Ill. App. 2d 403; *Randall Dairy Co. v. Pevely Dairy Co.* (1934), 274 Ill. App. 474. See also *Gertz v. Robert Welch, Inc.* (7th Cir. 1982), 680 F.2d 527, 539 & n.19 (imputing an agent's actual malice to the corporate defendant).) We

cannot, however circumvent the actual-malice requirement in this case by pooling all of the information arguably within the knowledge of various employees and imputing all of that knowledge to the corporate defendant to establish that the corporate defendant acted with actual malice. This is what plaintiff seems to be asking us to do, pointing out the various items of information which at some point were known (or may have been known) to different employees. In our view, before a corporate defendant may be found liable under the actual-malice standard, there must be a finding that at least one agent or employee involved in publishing the material acted with actual malice. As already discussed, defendant has not established that either Wilson or Young acted with actual malice. We also believe (as discussed below) that there was insufficient evidence to necessitate a finding that any other employee involved acted with actual malice. The other employees somewhat involved in the publications at issued include Randy Kirk and Ronald Dillman.

The evidence established that Randy Kirk, city editor at the time of the publications in issue, had heard a "flurry of rumors" in 1970 and 1971 about various officers being involved in burglaries. He had heard some specific names mentioned, and Reed's name was not among them. In 1976 or 1977 an undisclosed source gave CN particular names and dates regarding particular burglaries, which information was passed along to Kirk. Still, Reed's name was never mentioned to Kirk. In fact, Kirk acknowledged that Reed's name was never mentioned to Kirk before release of the grand jury report.

Kirk's knowledge that certain individuals were allegedly involved, in conjunction with the fact that Reed's name was not mentioned to him, does not, in our view, amount to such clear and convincing evidence that a jury would be required to find that Kirk acted with actual malice. This is particularly true in view of the undisputed evidence that, upon seeing the long list of officers listed in the draft of Bob Wilson's December 21, 1978,

article, Kirk explicitly instructed Wilson to verify the names with the State's Attorney's office, and that Wilson later reported to Kirk that he had done so. Nor, in our view, does the failure to do any further checking into this same issue before allowing the follow-up story necessarily establish actual malice on Kirk's part. Kirk supervised 12 reporters, and there is no evidence that he undertook or should have undertaken the task of verifying all of the facts in a story--a task which the testimony indicates was primarily left to the individual reporters.

Ron Dillman, the executive editor at the time the articles in issue were published, was kept abreast of the stories' contents. He gave uncontradicted testimony that he directed Kirk to verify the facts in the December 21, 1978, story. In view of this evidence, we fail to see how the jury could be required to find that Dillman acted with actual malice. Nor do we belive that his failure to do any additional investigation before allowing follow-up stories to be published

necessarily indicates actual malice. Dillman was in charge of overseeing the newspaper's entire operation; it is simply not realistic to expect Dillman to have verified the role of each officer whom his reporter stated was implicated.

In reviewing the jury's conclusions regarding lack of malice, we have found that the circuit court failed to submit any jury instructions as to one of the December 21, 1978, articles, namely, the article which contained no by-line but to which Carl Young admittedly contributed. Perhaps the parties understood that since there was no proof of any other CN employee's involvement in this article, and since a verdict was directed for Carl Young, there was no need to submit an instruction on this article to the jury. The record is completely unclear on why this particular December 21 article was dropped from deliberation, and the parties have not addressed this occurrence. In any event, it is clear that if there were any error in failing to have the jury make an explicit finding regarding this article, the error was waived by failure to object at trial.

(See *Western Casualty & Surety Co. v. Brochu* (1985), 105 Ill. 2d 486, 500.) It is equally clear that any such error was harmless. The reason is that the only individuals (other than Carl Young) arguably shown to be involved in this second December 21, 1978, article were as much (if not more) involved in the other December 21 article, which contained the same allegedly libelous statement that plaintiff had been "implicated" in burglaries. The jury's having found no malice with respect to the first December 21 article, it is manifest that the jury was equally unconvinced of malice with regard to the second December 21 article.

VI. INSTRUCTIONS REGARDING ACTUAL MALICE

Plaintiff next submits that errors were committed in instructing the jury regarding actual malice. The court instructed the jury in part as follows:

"The term 'actual malice' is a legal term and does not lend itself to an exact definition. In defining 'actual malice, 'I instruct you that as a matter of law, Michael Reed is a public official, and public officials in actions based on libel must show that the defendant either knew that the statement was false or that the defendant had a reckless disregard for the accuracy of the statements.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publications. Publishing with such doubts shows reckless disregard for the truth or falsity."

This instruction adequately conveys to the jury that "actual malice" denotes knowledge of a statement's falsity or serious doubts as to its truth. Plaintiff does not challenge this instruction directly. Rather, he submits that the circuit court erroneously refused additional instructions on the actual-malice issue, instructions which he believes clarify the meaning of actual malice and the means of proving it. We examine these instructions with due regard for the fact that, while a party is entitled to have the jury accurately instructed, he has no right to have any particular instruction submitted if the subject of the instruction is adequately covered in other instructions; needless repetition in jury instructions should be avoided. See, *e.g.*, *Kingston v. Turner* (1987), 115 Ill. 2d 445, 448.

The first instruction regarding actual malice which plaintiff submits was erroneously refused states:

"If you determine serious inaccuracies were made by a defendant in the reporting of the

grand jury report, you may consider this as a factor in determining whether there was underlying malice."

This instruction does no more than inform the jury that they may rely on circumstantial evidence to determine a fact in issue; the import of the instruction is that the more serious the inaccuracy, the more likely its author may have acted with actual malice. The jury clearly understood that if it believed that such an inference were an accurate one, it was perfectly free to draw such an inference. The jury was instructed on circumstantial evidence as follows:

"A fact may be proved by circumstantial evidence. Circumstantial evidence consists of proof of facts which give rise to a reasonable inference of the truth of the fact sought to be proved."

Considering this standard instruction, we believe the jury was adequately instructed on the use of the circumstantial evidence upon which plaintiff now focuses.

The next instruction which plaintiff submits was erroneously refused states:

> "Actual malice does not necessarily connote personal spite or ill will so much as an intention to do an act from which injury may be expected. Reckless disregard implies a higher degree of culpability than negligence. Reckless means indifference to consequences."

In indicating that reckless disregard for the truth of a matter means "indifference to the consequences," this instruction is inaccurate. "Reckless disregard," for first amendment purposes, does not mean indifference. Rather, it means entertaining serious doubt as to a statement's truth. The instruction is also inaccurate in indicating that actual malice means an intention to

do an act from which injury may be expected. Clearly, in publishing material indicating that an individual is a burglar, an author recognizes that injury may be expected. The issue, however, is whether he knows that the statement is false or seriously doubts that the statement is true. Because this instruction was substantially inaccurate, it was properly refused.

The next instruction which plaintiff submits was erroneously refused states:

> "Actual malice is a state of mind. It is a lack of reasonable grounds for belief in the truth of the published statement and therefore a reckless disregard of the rights of the plaintiff. Malice may not be implied or inferred merely from the fact of the publication or merely from negligence in the publication. However, actual malice may be proved by either direct or circumstantial evidence."

In indicating that actual malice is a lack of reasonable grounds for belief in the truth of a published statement, this instruction is clearly erroneous. This instruction contains language more indicative of a negligence standard, a standard which was inapplicable to this case. Moreover, the reference to circumstantial evidence is redundant of a separate instruction. For these reasons, the instruction was properly refused.

Plaintiff next submits that the following instruction was erroneously refused:

> "You, the jury, are instructed that actual malice may be inferred when the investigation for a story which is not 'hot news' is grossly inadequate."

To support this proposition plaintiff cites *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975. In *Curtis Publishing Co.*, Justice Harlan, in a plurality opinion, stated that with respect to "public figures"

(as distinguished from "public officials"), actual malice should not be required and a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" should be sufficient. (388 U.S. at 155, 18 L. Ed. 2d at 1111, 87 S. Ct. at 1991.) Justice Harlan then concluded that the jury "must have decided that the investigation *** was grossly inadequate in the circumstances" (388 U.S. at 156, 18 L. Ed. 2d at 1112, 87 S. Ct. at 1992), a finding which he found was supported by the evidence and which he believed justified a verdict for the plaintiff for false publication. Justice Harlan thus did not state that "actual malice" could be shown by failure to investigate, but merely that "with respect to public figures" actual malice should not be required. The majority, however, rejected this conclusion and the Court has subsequently applied the actual-malice standard to public figures. (See *Herbert v. Lando* (1979), 441 U.S. 153, 156, 60 L. Ed. 2d 115, 121, 99 S.Ct. 1635,

1638-39.) Plaintiff has thus misconstrued *Curtis Publishing Co.*, as did *Newell v. Field Enterprises, Inc.* (1980), 91 Ill. App. 3d 735, upon which he also relies.

Plaintiff thus has not cited any authority indicating that this instruction properly states the law. However, even assuming, *arguendo*, that the instruction does accurately state the law, it would nevertheless have been error for the circuit court to submit it, for numerous reasons. First, plaintiff did not tender an instruction containing, nor have we found, a definition of "hot news," the colloquial term used by Justice Harlan. The definition of this term is certainly subject to disagreement. Second, and more important, the instruction improperly focuses the jury's attention on a single point that plaintiff wished to emphasize--the adequacy of the investigation--rather than on the critical subjective inquiry of whether defendant did actually entertain serious doubts as to the truth of a publication. This court has long held that instructions singling out particular facts or evidence and giving them undue

prominence are erroneous. (See *e.g., Mount v. Dusing* (1953), 414 Ill. 361; *Garvey v. Chicago Rys. Co.* (1930), 339 Ill. 276; *Hoffman v. Ernest Tossetti Brewing Co.* (1912), 257 Ill. 185.) We further find that this instruction is argumentative and was improper on this basis as well. Jury instructions should not be argumentative in form. (*City of Waukegan v. Stanczak* (1955), 6 Ill. 2d 594.) We further find that the instruction on circumstantial evidence, in conjunction with the instruction on actual malice, adequately informed the jury regarding the relevance of any inadequacy in the investigation.

Plaintiff next complains of certain comments made by the circuit court in ruling on the use of evidence, comments which plaintiff claims "psychologically induc[ed] in the jury a predilection to place upon the plaintiff an insurmountable burden of proof." We find none of these statements improper. In each instance the court was either stating its reasons for excluding evidence or explaining the limited purpose for which such

evidence could be presented. This court long ago held that a statute stating the jury instructions are to be written was not intended to preclude a circuit court, in admitting evidence, from orally telling the jury the limited purpose for which certain evidence is being presented. (*People v. Horn* (1923), 309 Ill. 23.) We believe that the current provision regarding written instructions (Ill. Rev. Stat. 1987, ch. 110, par. 2-1107) also was not intended to preclude such contemporaneous explanations by the circuit court. It is also well-established that a circuit court, in ruling on the admissibility of evidence, may state its reasons for such rulings without violating the provision requiring written jury instructions. See *South Park Commissioners v. Ayer* (1910), 245 Ill. 402.

VII. INSTRUCTIONS REGARDING BURDEN OF PROOF

Plaintiff next argues that the circuit court erred in refusing four of his jury instructions regarding the burden of proof. The first such instruction is based on Illinois Pattern Jury Instructions, Civil, No. 5.01 (2d ed. 1971) (IPI Civil 2d). The instruction submitted provides in part that under certain conditions a party's failure to produce a witness may permit an inference that the witness' testimony would have been unfavorable to that party. Plaintiff refers us to testimony of Randy Kirk, city editor of CN when the stories here in issue were published. Mr. Kirk testified that "at 9 a.m. each day we have *** an editorial board meeting" and that such a meeting was held on the morning that the first allegedly libelous article was published. Plaintiff submits that defendant's failure to produce certain persons who attended this meeting justifies giving IPI Civil 2d No. 5.01. Kirk's testimony, however, indicated that he did not recall the details of the December 21 meeting and only presumes that he told those in attendance that the burglary story was to be published that

day. His testimony does not indicate that he named the particular officers to be mentioned in the story or that plaintiff's name was even mentioned. Considering that there is virtually no evidence indicating that the others attending the meeting received any information incriminating to defendants, and further considering the fact that their recollection would have greatly lessened during the eight years that elapsed between the time of that meeting and the time of the trial, we find that the court did not abuse its discretion in refusing the instruction. We agree with the holding in *Maynard v. Irving Davis Co.* (1970), 122 Ill. App. 2d 28, that the circuit court should have wide discretion in determining whether to give this instruction.

Plaintiff next submits that the circuit court erroneously refused his instruction No. 13, which states the burden of proof. A court does not err in refusing to give an instruction which is fully covered by another instruction which the court does give. (*Lau v. West Towns Bus Co.* (1959), 16 Ill.

2d 442, *cert. denied* (1959), 361 U.S. 127, 4 L. Ed. 2d 180, 80 S. Ct. 256; *Ergang v. Anderson* (1941), 378 Ill. 312.) Such is the case here. The court properly defined both "preponderance of the evidence" and "clear and convincing evidence" when reading the issues instructions, and these are the definitions which plaintiff's instruction No. 13 sought to define. The court also articulated which burden of proof applied to which issues, indicating that plaintiff must prove by clear and convincing evidence actual malice.

Plaintiff next complains that the court refused his instruction "which summarizes and defines what libel is." Plaintiff's instruction is similar to one given except that his instruction explicitly mentions pictures as a form of publication which can be libelous, whereas the instruction actually given refers only to "written statements." We believe that in applying the instruction which they actually received, the jurors would have naturally considered the picture of Michael Reed in conjunction with his name and the caption

appearing under the picture, which caption is entitled, "Current Officers Implicated in the Report." In any event, any error in refusing plaintiff's instruction was harmless, since the court directed a finding that publication of the caption and photograph was defamatory as a matter of law.

VIII. ADDITIONAL ALLEGED TRIAL ERRORS

Plaintiff's next complaint relates to a reference in certain of the articles indicting that a lie detector test would be given to all policemen potentially involved, including him. Plaintiff submits that, considering such references, the circuit court erred in refusing to admit an April 6, 1979, CN article explaining the outcome of the lie detector tests and indicating that plaintiff passed the test. However, as the circuit court made clear to the jury, defendant's innocence or guilt was not at issue; the issue was whether CN accurately reported the contents of the grand jury report.

Consequently, the results of the lie detector tests were irrelevant, and the court did not err in excluding the article. It would have diverted attention from the issues critical to the resolution of the case.

Plaintiff next submits that the court erroneously refused to submit his Exhibit 2 to the jury. Exhibit 2 is a September 8, 1977, CN article stating that "sources" indicate that "as many as seven officers" were involved in the break-ins. This was not an article alleged to be libelous. Rather, plaintiff attempted to use this article to show that months before the grand jury report was issued defendants knew that only seven officers were involved in the break-ins and that plaintiff was not one of them.

Initially we note that plaintiff apparently is mistaken in concluding that the jury was not given the exhibit. The transcript relates that the circuit court initially determined which exhibits would go into the jury room and did not include Exhibit 2. Thereafter, the following exchange took place:

"DEFENSE COUNSEL: Our position is that if they're going to have the grand jury report, they should have everything.

THE COURT: Copies of newspapers?

PLAINTIFF'S COUNSEL: Right, all of them.

THE COURT: Alright."

Thus, the record suggests that this newspaper article was, in fact, given to the jury. If, however, Exhibit 2 was not given to the jury for their deliberations, plaintiff's counsel did not object and therefore the issue was not preserved for appeal. Moreover, plaintiff would not have been denied a fair trial by the failure to submit this exhibit, and therefore this would be an inappropriate case to apply the exception to the waiver rule. (See *McElroy v. Force* (1967), 38 Ill. 2d 528, 535.) The relevance of this exhibit was extremely tenuous; even if in September 1977 the defendants

knew that only seven officers were involved and that plaintiff was not among them, this fact would not be inconsistent with the conclusion that many months later plaintiff did become suspected.

Plaintiff next argues that the court erroneously refused to admit into evidence, or allow interrogation regarding, articles published after the instant suit was filed (post-filing publications). Plaintiff argues that these post-filing publications were probative of whether the defendants herein published the earlier articles (the allegedly libelous articles here in issue) with actual malice.

We note again that it appears from the record that all newspaper articles presented did go to the jury. However, assuming, *arguendo*, that these particular articles were withheld from the jury, it was within the the court's discretion to do so, for these post-publication articles lack significant probative value. The reason is that there was no evidence, other than the evidence presented of knowledge preceding the publication of the articles

in issue, that defendants knew or seriously questioned the truth of these post-filing publications. The cases cited by plaintiff in support of his argument indicate that any subsequent publishing of a libel with knowledge of its falsity is evidence of actual malice. However, in the instant case plaintiff showed only that CN repeated its statements after plaintiff filed suit; there is no showing that, during the interim between when the initial articles and the post-filing articles were published, CN gained any additional information which held it to question its initial newspaper accounts.

Plaintiff's next complaint relates to testimony of Craig DeArmond, who during 1978 and 1979 was an assistant State's Attorney of Vermilion County. DeArmond testified during direct examination by plaintiff's counsel that during 1978 and 1979 Thomas Fahey, State's Attorney, had a policy established that all telephone calls regarding opinion matters were to be referred to him, and that such policy would encompass a phone call seeking

an interpretation of a grand jury report. DeArmond then testified that he did not recall whether CN reporter Bob Wilson talked to him on December 21, 1978. Subsequently, on cross-examination, DeArmond was asked whether he did not know if such a conversation occurred on December 21, 1978, or whether he merely did not remember whether such a conversation occurred. After DeArmond indicated that he simply could not remember, defense counsel, over objection, quoted some earlier trial testimony of Bob Wilson, and asked whether such testimony refreshed DeArmond's memory. The Wilson testimony quoted was: "I believe I first asked the State's Attorney, Thomas Fahey, and he referred me to Craig DeArmond, since Craig DeArmond conducted the grand jury and authored the report."

Plaintiff submits that quoting this prior testimony was an improper means of refreshing DeArmond's recollection. However, we agree with the numerous appellate decisions holding that the manner and mode of refreshing a witness'

recollection is largely within the discretion of the circuit court. (See, *e.g.*, *People v. Black* (1980), 84 Ill. App. 3d 1050, 1054; *People ex rel. Raines v. Price* (1976), 37 Ill. App. 3d 921, 925; *People v. Van Dyk* (1976), 40 Ill. App. 3d 275, 279; *Kerz v. Arkin* (1971), 2 Ill. App. 3d 1057, 1061.) While it clearly would be a better practice to have the prior testimony recounted outside the jury's presence, so as not to unduly emphasize certain testimony, we cannot say that the circuit court abused its discretion in permitting this verbatim recitation of an extremely brief portion of Wilson's testimony, testimony with which the jury was already familiar.

Plaintiff's final argument is that he was unfairly prejudiced when Les Smith, a reporter for CN from 1972 through 1978, refused to disclose a source of some information which he obtained relating to the burglary ring. Les Smith testified that in the late winter or early spring of 1977, another CN reporter ("Dan") received some information from a confidential source that burglaries

were being conducted by police officers. Smith and this other reporter checked into those allegations and found no evidence that any such burglaries were then occurring but "did come across allegations that some had occurred in the early 1970's."[1] These sources were "trusted police officers," and some of these sources gave the reporters names of officers allegedly involved in the burglaries. Smith testified as to five names which he specifically recalled hearing at the time, but he could not recall whether other names were also mentioned. He did, however, state that at no point prior to reading Wilson's December 21, 1978, article did he hear plaintiff's name mentioned in connection with the burglary.

Despite a court ruling requiring disclosure of Smith's sources, Smith refused during discovery to disclose those sources, and at trial he again refused. At no point did the court impose sanctions for this noncompliance. Rather, outside the presence of the jury, the court again listened to arguments of counsel on this issue and concluded

that the names of these sources were not relevant. For reasons explained below, we believe that the court did not abuse its discretion in reaching this conclusion.

It is important to emphasize that Les Smith was not a defendant and that the article which he wrote was not one of the allegedly libelous ones; rather, it was published over 15 months prior to the earliest allegedly libelous article. It is also important to note that Smith did not claim that his sources had implicated plaintiff. Plaintiff nevertheless attempts to establish relevance on the theory that these sources not only failed to mention plaintiff but also told Smith that only the officers whom they mentioned were involved. Plaintiff then argues that the conclusion which Smith must have drawn is that plaintiff was definitely not involved. It of course strains reasonableness to argue that the sources would have purported to be sure that only certain individuals were involved and no others. However, plaintiff reaches this conclusion and then submits that perhaps the authors of the allegedly

defamatory articles also talked to these same sources and were given the same definitive list of the only officers involved--a list not mentioning plaintiff. This conclusion is also highly speculative. Plaintiff then further submits that the authors of the allegedly defamatory articles would have been contemplating this conversation some 15 months later when they were writing the articles and that recollection of this conversation would have caused them, when reading the grand jury report, to seriously doubt whether the report actually implicated plaintiff. Plaintiff's line of reasoning fails to take account of the possibility that during the 15-month time span evidence of additional participants might have been discovered and presented to the grand jury. This possibility would surely have been apparent to the authors of the allegedly libelous articles.

Plaintiff apparently believes that had the names of these confidential sources been disclosed prior to trial, he could have obtained the testimony of these sources and perhaps established that the

above scenario occurred. Considering the long and tenuous nature of the chain purportedly linking these sources to any relevant issue in this case--the state of mind of the allegedly defamatory authors--we find that the court did not abuse its discretion in concluding that the identity of these sources was irrelevant.

IX. CONCLUSION

We certainly do not condone the defendants' failure to thoroughly study the grand jury report and verify that their interpretations of the report were completely accurate. Nor do we wish to understate the severe harm which plaintiff undoubtedly suffered as a result of this publicity. However, the United States Supreme Court has mandated that public officials establish actual malice when seeking damages for libelous publications regarding their official conduct. Since we find insufficient evidence to overturn the verdicts on the actual-malice issue, and since we

find no other trial error which has unfairly prejudiced plaintiff, we are compelled to uphold the verdicts and affirm the appellate court's decision.

Affirmed.

MILLER and STAMOS, JJ., took no part in the consideration or decision of this case.

(Docket No. 4-80757 in the Illinois App. Court-Fourth District-JudgmentAffirmed)

159 Ill.App.3d 699, 512 NE2d 828 (1987).

Michael Reed, Appellant v. Northwestern Publishing Company, d/b/a The Commercial News, Bob Wilson and Carl Young, Appellees

Opinion filed August 24, 1987

Justice **SCOTT** delivered the opinion of the court:

The plaintiff (Reed) brought this action for libel against the Northwestern Publishing Company, publisher of The Commercial News, a newspaper in Danville, and two of its reporters, Bob Wilson and Carl Young. Reed alleged in his complaint that Wilson and Young were the authors of some defamatory material concerning Reed which appeared in The Commercial News.

The trial court initially entered a summary judgment order in favor of defendants on June 29, 1983, and denied plaintiff's motion to

vacate the order. Plaintiff's appeal to the Fourth District Appellate Court resulted in reversal of the summary judgment order (*Reed v. Northwestern Publishing Co.* (1984), 129 Ill.App.3d 133, 84 Ill.Dec. 305, 471 N.E.2d 1071). On remand, a jury trial was had on the matter which resulted in a judgment for the defendants The Commercial News and Bob Wilson. Defendant Carl Young was dismissed at the close of the plaintiff's case upon a motion for directed verdict.

Plaintiff then filed a post-trial motion which was denied and, thus, appeals the directed verdict in favor of Carl Young, and the judgment in favor of Bob Wilson and The Commercial News.

The facts of this case have been thoroughly set forth by this court in plaintiff's prior appeal of the trial court's summary judgment order (*Reed v. Northwestern Publishing Co.* (1984), 129 Ill.App.3d 133, 84

Ill.Dec. 305, 471 N.E.2d 1071). Therefore, we will briefly summarize the pertinent facts.

The newspaper articles of which plaintiff complains stemmed from a grand jury investigation of burglaries and thefts allegedly committed by several members of the Danville Police Department during 1970 and 1971. Testimony on this subject was presented to a grand jury in several sessions in 1977 and 1978, and a seven-page report summarizing the testimony and the current grand jury's findings was released to the public on December 20, 1978. On the following day, The Commercial News published photographs and two articles relating to the investigation and report. The caption "Current Officers Implicated in Report" appeared under photographs of the plaintiff and of two other members of the Danville Police Department and of a county deputy sheriff. A caption appearing below the above caption stated "Four current law officers--Arnold

Yanders, Robert Testa, Michael Reed and Kenneth Cox--were named by grand jury witnesses as joining in at least one or a few of the reported break-ins by policemen." In an article titled "Grand Jury Describes Police Burglary Setup," Bob Wilson referred to the involvement of two officers in several burglaries and then wrote:

> "Massey, Roland and several other witnesses at the grand jury sessions identified other officers involved too.
>
> They included former policemen Jerry Hill and Richard Moody and current officers Sgt. Robert Testa, patrolman Arnold Yanders, patrolman Mike Reed, and former patrolman Kenneth Cox, who is now a county deputy."

The article further stated, "Lt. Edwin McGee also testified about the Harding Pharmacy burglary, saying he came on the scene and found Hill, Roland, Massey and Officer Mike Reed

inside but without their flashlights turned on." An accompanying article headlined "3 Deny Roles in Burglaries," stated "grand jury testimony summarized in the report said Reed was spotted inside a pharmacy with two officers who committed several burglaries."

On December 23, 1978, The Commercial News published another article written by Wilson concerning the investigation which summarized the grand jury's report by identifying the plaintiff as one of three current officers who had been named as participants in the misconduct. The article also repeated plaintiff's denial of the incident which had been quoted in one of the articles published two days earlier.

Carl Young wrote later articles concerning the investigation on March 6, 10, 28 and 29, 1979, which were also published by The Commercial News. These articles referred to the presence on the Danville police force of three

current officers who had been mentioned in the grand jury report as participants in the misconduct. The officers were not specifically mentioned by name in these articles, but one of the articles did concern the City's decision to administer polygraph tests to a total of seven current police officers.

Plaintiff argues that the articles published by The Commercial News were libelous in that they portrayed the plaintiff as a burglar and being involved in a police burglary ring, and further, that the allegations contained in the articles published by the defendants were not supported by the grand jury investigation report.

The plaintiff's name was mentioned twice in the grand jury report. The first reference came in a summary of an Officer Miller's testimony in which Officer Miller described his suspicion of police misconduct and the ensuing internal investigation of the problem. Officer

Miller described a police burglary of the local American Legion Hall, an occurrence in which two other officers admitted their involvement. The grand jury report said:

> "Officer Miller described the Legion burglary of December 21, 1970 and how Massey had fortuitously discovered an open window, failed to call it in, met with Officer Hill and returned to the Legion, leaving Miller posted outside. Miller testified that Massey had previously questioned him concerning whether upon finding a place broken into, would he accept something taken by Officers(.) Massey also asked him what his favorite liquor was; to which Miller replied, 'Scotch'. After all Officers who initially responded; including: Calvin Norman, Jerry Hill, Jack Roland and Michael Reed, had left, the owner was called to check out the premises. When they left the

scene, Officer Miller found a bottle of Scotch under his side of the seat in their squad car."

The other reference to plaintiff came in the summary of Officer McGee's testimony, who had also taken part in the internal investigation. The grand jury report stated:

"Lt. Edwin McGee testified as to his responding to the August 25, 1971 burglary at Harding's Pharmacy where he found Officers Hill and Reed at the scene with Roland and Moody showing up later. His investigation of the scene, specifically including the watch case and shaver display showed nothing to be missing or disturbed, however, when he read the report submitted the next day by Hill, it showed watches, shavers and radios to have been taken along with a large amount of cash."

We acknowledge that the statements concerning the plaintiff in the articles published by The Commercial News and the statements concerning the plaintiff in the grand jury report are not parallel. However, the question is whether the statements, headlines and pictures published by The Commercial News were done so with actual malice.

Plaintiff initially argues that the actual malice standard for libels of public officials set forth in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686, does not apply to this situation as he was merely a patrol officer and cannot be construed to be a public official. We believe this question has already been decided in *Reed v. Northwestern Publishing Co.* (1984), 129 Ill.App.3d 133, 84 Ill.Dec. 305, 471 N.E.2d 1071, wherein this court, when ruling upon an appeal of summary judgment for defendant, determined that plaintiff Reed was a public

official according to Illinois courts that have considered the issue. (See *Coursey v. Greater Niles Township Publishing Corp.* (1968), 40 Ill.2d 257, 239 N.E.2d 837.) We concur with the prior decision that Reed is a public official and thus subject to the public official standard of *New York Times*.

Our inquiry must therefore focus on whether the jury verdict in favor of the defendants is against the manifest weight of the evidence. *Spankroy v. Alesky* (1977), 45 Ill.App.3d 432, 4 Ill.Dec. 126, 359 N.E.2d 1078.

The jury found that although the December and March publications were false and defamatory, they were not published with actual malice. Thus, we must review the case and determine "whether the result reached below was one which is reasonable on the facts in evidence, not whether other conclusions might also have been reached." *Lynch v.*

Board of Education (1980), 82 Ill.2d 415, 423, 45 Ill.Dec. 96, 103, 412 N.E.2d 447, 454.

In *New York Times*, 376 U.S. at 279-280, 84 S.Ct. at 725-26, the Supreme Court held that the first amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The meaning of making a statement with knowledge is clear, however, determining what constitutes a reckless disregard of the truth requires further explanation. In *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125, the Supreme Court defined reckless disregard as requiring proof that the defendant had a "high degree of awareness of their probable falsity." The Supreme Court

further stated in *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 that:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

See also *Fogus v. Capital Cities Media, Inc.* (1982), 111 Ill.App.3d 1060, 67 Ill.Dec. 616, 444 N.E.2d 1100. Therefore, the defendants must have been more than merely negligent in reporting the falsehoods; there must have been some high degree of awareness or doubt with regard to the accuracy of the statements made.

[1] Additionally, actual malice must be proved with convincing clarity. (*Catalano v. Pechous* (1980), 83 Ill.2d 146, 50 Ill.Dec. 242, 419 N.E.2d 350, *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).) We interpret this to mean a higher standard of proof than the preponderance of the evidence test.

Plaintiff contends that all of the named defendants acted with reckless disregard of the truth. Plaintiff states that The Commercial News had conducted an independent investigation and had inside information from an undisclosed source concerning the police burglary ring; further, that Dan Olmstead and Les Smith, agents of the newspaper, knew that these inside sources were giving names of those policemen involved and that plaintiff was not one of them. Nonetheless, plaintiff states, when the December 21, 1978, article authored by Bob Wilson was published, plaintiff was listed as a policeman involved in the burglary ring, which caused the editor of The Commercial News concern as he knew that plaintiff was not involved.

Defendants maintain, however, that during 1977, Bob Wilson's only information about the police burglaries was that the grand jury investigation was pending that Dan Olmstead

and Les Smith were looking into the matter. He had no information concerning names, dates or places, and no such information had been supplied to him.

The evidence also indicates that when Wilson first saw the grand jury report, it was late in the afternoon of December 20, 1978. The following morning at 7:30 a.m., he was instructed to write a summary of the report, with a 10:30 a.m. deadline; further, on the morning of December 21, 1978, city editor Randy Kirk asked Wilson to check the content of the grand jury report with the State's Attorney's office. Wilson, as requested, interviewed an assistant State's Attorney responsible for preparing the grand jury report. The assistant State's Attorney told Wilson that if an officer's name had been included in the report, they were officers identified by two or more witnesses as being at the scene of two or more burglaries.

[2] We believe that the jury was faced with a situation of whom to believe. After undoubtedly determining that the statements were false, the jury had to decide whether the defendants acted with reckless disregard when publishing the articles. At this point, the credibility of the witnesses must have been taken into account. The jury obviously believed the defendants and we do not consider the jury's decision to be against the manifest weight of the evidence; particularly when the plaintiff must prove his case by clear and convincing evidence.

[3] With regard to defendant Carl Young and the articles that he authored which appeared in The Commercial News on March 6, 10, 28 and 29 of 1978, we believe the trial court correctly dismissed Young as a defendant. The articles were devoid of plaintiff's name. Although Young relied upon the earlier articles authored by Wilson, we need not

determine whether Young acted with actual malice because the articles do not libel the plaintiff. If plaintiff's name had been mentioned, we would then need to consider actual malice, but the articles were merely generalized statements concerning the incident and, at best, infer to one well read on the particular subject that plaintiff had any involvement. The only phrase that could be considered as regarding the plaintiff was, "three current officers." This phrase, without more, is not enough to base a libel action.

Plaintiff urges that numerous instructions were erroneously denied by the trial court upon defendants' objections and that those instructions would have appropriately instructed the jury concerning actual malice and the burden of proof to be applied. The trial court, however, formulated instructions regarding actual malice and the burden of proof. Upon review of those instructions, we

believe that the trial court fairly, appropriately and adequately instructed the jury as to applicable law of the case. Any of the instructions proposed by plaintiff would have either been superfluous or inaccurate. We believe the instructions, taken as a whole, were proper.

Lastly, plaintiff raises objections to numerous alleged errors by the trial court and asks for reversal upon those grounds. We have reviewed each alleged error and without summarizing the numerous allegations are of the opinion the trial court was either not in error, or the error did not prejudice the plaintiff's case.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

HEIPLE and WOMBACHER, JJ., concur.

IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS VERMILION COUNTY, DANVILLE, ILLINOIS

MICHAEL REED,	)	
	)	
Plaintiff,	)	
	)	NO. 79L330
v.	)	
	)	
NORTHWESTERN PUBLISHING COMPANY d/b/a THE COMMERCIAL NEWS; BOB WILSON; and CARL YOUNG,	)	
	)	
Defendants.	)	

JUDGEMENT ON THE VERDICT

Based on the answers to six special questions submitted to and answered to the Jury, which answers are of record in this case, judgement is hereby entered infavor of the defendants, **BOB WILSON** and **NORTHWESTERN PUBLISHING COMPANY d/b/a THE**

COMMERCIAL NEWS, and against the plaintiff, **MICHAEL REED**, to all Counts of the Second Amended Complaint filed herein.

ENTERED this 1st day of July, 1986.

/s/ Carl A. Lund
Judge

APPROVED AS TO FORM

/s/ Thomas B. Meyer,
Attorney for Defendants

/s/ Richard B. Opsahl,
Attorney for Plaintiff

IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS VERMILION COUNTY, DANVILLE, ILLINOIS

MICHAEL REED,	)	
	)	
Plaintiff,	)	
	)	NO. 79L330
v.	)	
	)	
NORTHWESTERN PUBLISHING COMPANY d/b/a THE COMMERCIAL NEWS; BOB WILSON; and CARL YOUNG,	)	
	)	
Defendants.	)	

JUDGEMENT BASED ON COURT'S DIRECTED VERDICT

Upon motion by defendant, **CARL YOUNG**, for directed verdict as to that defendant, said motion being granted by the court, judgement is hereby entered in favor of the defendant, **CARL YOUNG**, and against the plaintiff,

Michael Reed, as to all Counts of the Second Amended Complaint pertaining to the defendant, **CARL YOUNG.**

ENTERED this 1st day of July, 1986.

/s/ Carl A. Lund
Judge

APPROVED AS TO FORM:

/s/ Thomas B. Meyer
Attorney for Defendant

/s/ Richard B. Opsahl
Attorney for Plaintiff

IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT VERMILION COUNTY, DANVILLE, ILLINOIS

MICHAEL REED,	)	
	)	
Plaintiff,	)	
	)	NO. 79L330
v.	)	
	)	
NORTHWESTERN PUBLISHING COMPANY d/b/a THE COMMERCIAL NEWS; BOB WILSON; and CARL YOUNG,	)	
	)	
Defendants.	)	

ORDER OF COURT

This cause came on for hearing on October 8, 1986, on plaintiff's post-trial motions. Plaintiff Michael Reed was represented by his attorney, Richard B. Opsahl, and defendants Northwestern Publishing Company and Bob Wilson were represented by

Thomas B. Meyer. The Court has considered the written post-trial motions with the amendment thereto filed on the day of the hearing. Arguments of counsel and authorities cited.

I

Plaintiff's Motion for Judgment Notwithstanding the Verdict on Liability is not meritorious and is denied.

II

Plaintiff's Motion for New Trial, which refers to the verdict being against the weight of the evidence and objects to the failure to give certain instructions, has been considered by the Court. A great deal of time was spent prior to trial and during the trial on the proper instructions of the jury. The Court reiterates its earlier holding that the jury was properly instructed, that the jury instructions were adequate and clear enough that the jury could understand them, and the Motion for New Trial is denied.

III

The Court has considered the plaintiff's Motion for Judgment as to Liability As Against Carl Young and finds that the motion is not meritorious, and the motion is denied.

IV

The Court has considered the Motion for New Trial As To Carl Young, finds that the motion is not meritorious, and the motion is denied.

V

The Court has considered the various alleged errors in evidentiary rulings and finds that the motion in connection thereto is not meritorious, and the motion is denied. It is therefore the order of the Court that the post-trial motions of the plaintiff, Michael Reed, are denied.

Entered this 16th day of October, 1986.

/s/ Carl A. Lund
Circuit Judge

No. 88-1224 (3)

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

MICHAEL REED,

Petitioner,

vs.

NORTHWESTERN PUBLISHING CO., d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENTS NORTHWESTERN PUBLISHING CO. d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(15354)

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In The

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MICHAEL REED,

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BRIEF FOR RESPONDENTS NORTHWESTERN PUBLISHING CO. d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent Northwestern Publishing Company herein discloses that it is a wholly-owned subsidiary of Gannett Co., Inc.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is found in Petitioner's Appendix ("PA") at 1a and 124 Ill.2d 495, 530 N.E. 2d 474, 125 Ill. Dec. 316 (1988). The opinion from the Appellate Circuit Court of Illinois, Fourth District is found at 65a and 159 Ill. App. 3d 699 (1987).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

The Petitioner, Michael Reed, brought an action for libel against Respondent Northwestern Publishing Company, publisher of *The Commercial News*, a newspaper in Danville, Illinois, and against two of its reporters, Respondents Bob Wilson and Carl Young. Wilson and Young were the authors of some of the allegedly defamatory material concerning Petitioner which appeared in *The Commercial News*.

The case was tried to a jury commencing June 16, 1986. At the conclusion of the trial, the jury was asked to answer six special questions. As to Respondent Wilson's articles, although the jury found them to be defamatory and false, the jury found that they were not published with constitutional "actual malice". As to the articles authored by Respondent Young, the jury found that they were not "of and concerning" the Plaintiff, and that they were neither false or defamatory, nor published with actual malice.

Based on the jury's answers to the special questions, judgment was entered in favor of the Respondents *The Commercial News* and Wilson. Petitioner's motions for judgment notwithstanding the verdict and for a new trial were denied.

Plaintiff pursued two unsuccessful appeals through the Illinois courts raising the identical issue raised in his present Petition, *i.e.*, whether Petitioner, a policeman, was a public official to whom the "actual malice" test of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny applies.

REASONS FOR NOT GRANTING THE PETITION

This Court should grant a Writ of Certiorari only where special and important reasons are shown. (Rule 17.1, Rules of the Supreme Court of the United States.) The issue raised by Petitioner here is whether a police officer is a public official to whom the "actual malice" test applies.

In support of that issue, Petitioner makes virtually the identical arguments he raised in both Illinois appellate courts. (Petitioner's brief on this issue in the Supreme Court of Illinois is reproduced in the Appendix to this brief.)

Each of Petitioner's arguments was carefully identified and analyzed by the Supreme Court of Illinois. The Supreme Court of Illinois concluded in a careful, thorough and thoughtful opinion that each of Petitioner's arguments were without merit. (12a-23a). The Petitioner here does not challenge the opinion of the Supreme Court of Illinois; he merely repeats the arguments made to that Court.

Respondents find it difficult, if not impossible, to improve upon the Illinois Supreme Court's opinion.

This case does not raise important questions of federal law, and the Supreme Court of Illinois correctly applied the governing law. Respondents therefore choose to rely on that opinion as its opposition to Petitioner's submission.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 14, 1989

Respectfully submitted,

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APPENDIX

Excerpts From Petitioner's Brief in the Illinois Supreme Court

ARGUMENT I

THE APPELLATE COURT ERRED IN HOLDING THAT PLAINTIFF WAS A PUBLIC OFFICIAL AS A MATTER OF LAW AND THAT PLAINTIFF WAS REQUIRED TO PROVE THAT THE DEFENDANTS PUBLISHED WITH "ACTUAL MALICE."

In the landmark 1964 decision of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Supreme Court held that, in order to recover for libel, a "public official" who was criticized in his official conduct must show with convincing clarity that the defendant acted with actual malice. In so doing, the Court safeguarded against excessive self-censorship, thus eliminating the "pall of fear and timidity imposed upon those who would give voice to public criticism, an atmosphere in which First Amendment freedoms cannot survive" (376 U.S. at 278). Excessive self-censorship is obviously harmful in a system of popular sovereignty. However, the Court undoubtedly realized that society also has a responsibility to protect an individual's reputation. Thus, the Court applied the stringent New York Times requirements only within the boundaries of "public officialdom."

The Court in New York Times did not define the term "public official" and declined to answer in detail the question of how far down into the lower ranks of government employees the "public official" designation would extend for purposes of the rule and did not specify categories of persons who would or would not be included or determine the boundaries of the official conduct concept (376 U.S at 283 note 23).

An examination of the precedents relied upon by the Court in New York Times provides some guidance concerning the scope of the "public official" concept. A careful analysis of the decisions relied upon discloses that none of them involved lower echelon public employees but included only individuals with positions of substantial actual or potential influence in the political arena (candidates for public office, a United States Congressman, members of the judiciary, high ranking police and military officers and federal and state executive officials of significant policy making authority). In the decades

following New York Times, a number of decisions have hinged upon exactly "how far down into the lower ranks of government employees that 'public official' designation would extend." It is submitted that a number of lower courts have grossly misinterpreted both New York Times and subsequent Supreme Court rulings by placing the lower echelons of government employees under the rubric of "public officials." Specifically, it is submitted that Mr. Reed, serving as an ordinary beat policeman, should not be subject to the stringent New York Times requirements.

In 1966, two years after New York Times, the Court in Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) was confronted with the question of how far down into the lower ranks of government employees the public official designation would extend. In Rosenblatt the Court rejected the suggestion that reference to state law standards would be controlling, and the Court attempted to delineate general federal guidelines for determination of "public official" status, noting that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation" (383 U.S. at 86). A concurring Justice Stewart emphasized this point by stating:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being---a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of a constitutional system" (383 U.S. at 92).

Although the Court recognized the need to protect an individual's reputation, it also acknowledged a "tension between this interest and the values nurtured by the First and Fourteenth Amendments"(383 U.S. at 86). Thus, the Rosenblatt Court attempted to set general guidelines for determining what types of government employees qualify as "public officials". With respect to the exact line of demarcation between the "public official" and the ordinary citizen, the Court stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs"(383 U.S. at 85).

In addition, the Court stated:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply" (383 U.S. at 86).

An important footnote caveat to this statement has been largely ignored by the lower courts. "Footnote thirteen" contradicts many of the lower courts which have applied the stringent New York Times requirements to lower-echelon government employees. In Footnote 13 (383 U.S. at p. 85), the Court in Rosenblatt noted that "merely because the statement defamatory of some person in government employ catches the public interest that this would not be in itself be sufficient to warrant the exacting first amendment protection of public official status." The Court further specifically rebutted the contention of concurring Justice Douglas that the key man in a government hierarchy might be a night watchman accused of taking state secrets and disregarded the notion advanced by Douglas that such a lower echelon employee should be required to comply with the New York Times criteria.

The conclusion of Rosenblatt was that in applying the general criteria of New York Times "that Rosenblatt may have held such a position of public official" but the Court did not hold that he fell within the public official classification. Rather the Court determined that it was a matter for the trial judge upon remand in the first instance to determine whether the proof showed that the plaintiff was a "public official". 383 U. S. at p. 88. This is a burden for the defendant to sustain and to show that the case is within the New York Times standard. If the defendant sustains that burden of proving public official status and thus the privilege granted by New York Times, then the plaintiff has the burden of proving the privilege was abused. In the instant case there was no

determination by the trial court in the first instance on the facts of this case that the Plaintiff was a public official but, it instead determined, as a matter of law, that the Plaintiff was a public official. It is submitted that the Defendant here had the burden of proving the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication. It was made clear in Rosenblatt that the question whether a person is a public official is to be determined not by state law standards but by standards announced by the U.S. Supreme Court. In the instant case it was incumbent on the trial court to find, by fact intensive analysis, that this Plaintiff was a public official based on one of the alternative tests of Rosenblatt. The appellate court in the instant case completely neglected to remark on this very important consideration.

In 1974, the Supreme Court addressed the question of the extent to which New York Times can be applied to private individuals. In Gertz v. Robert Welch, Inc. 418 U.S. 323, 94 S. Ct . 2997, 41 L .Ed. 2d 789 (1974), the Court conceded that the New York Times standard "exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test"(418 U.S. at 342). This led the Court to reject the Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 29 L.Ed. 296, 91 S.Ct. 1811 (1971) plurality extension of New York Times to matters of "public or general interest". The Court delineated two distinctive differences between public and private persons:

> "The first remedy of any victim is self-help --- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public official and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (Gertz, 418 U.S. at 344).

Secondly,

> "He [private individual] has not accepted public office or assumed an 'influential role in ordering society.' Curtis Publishing Co. v. Butts, supra, at 164, 18 L. Ed. 2d. 1094 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good

> name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood" (418 U.S. at 345).

With these two differences, the Court concluded that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery"(418 U.S. at 345).

In Coursey v. Greater Niles Township Publishing Corporation, 82 Ill. App. 2d 76, 227 N.E. 2d 164 (1967), the appellate court held that in regard to a patrolman:

> "He is an important symbol of government, but the lowest in rank of police officials, and it cannot be said that he has 'substantial responsibility for or control over the conduct of government affairs.'" (227 N.E. 2d at 168).

The Illinois Supreme Court, however, reversed the appellate court in 40 Ill. 2d 257, 239 N.E. 2d 837 (1968). There the Court stated:

> "It is our opinion that the plaintiff is within the 'public official' classification. Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly governmental in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers even at, and perhaps especially at, 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed toward the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws." (239 N.E. 2d at 841).

It is submitted that the course of treatment of the concept "public officials" by the United States Supreme Court would dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman as a matter of law. The concept of "public official" is not based on whether or not the public official is performing a "primary function of local government" as opposed to whether it is a "proprietary function," nor does the "great potentiality for social harm" fit within the standards announced in Rosenblatt. The question is: Does the official have substantial responsibility for or control over governmental affairs?

In a 1979 decision, the U. S. Supreme Court again rejected the notion of an all encompassing "public official" status. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979) casts doubt on how pervasively the term "public official" is to be construed. In that case, Senator Proxmire was the defendant. The suit stemmed from his "golden fleece of the month award." In April 1975 the award went to several government organizations that had spent almost half a million dollars to fund Hutchinson's research. At the time of the award, Hutchinson was Director of Research at the Kalamazoo State Mental Hospital, and was a state employee. He had also been an adjunct professor at Western Michigan University. The Supreme Court noted:

> "The District Court also concluded that Hutchinson was a 'public official.' 431 F.2d at 1327-1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F.2d 1027, 1035 N. 14 (C. A. 7, 1978). We therefore express no opinion on the issue. The court has not provided precise boundaries for the category of 'public official,' and cannot be thought to include all public employees, however." (443 U.S. at 119 note 8).

The Court thereby again explicitly rejected the notion that mere public employment is synonymous with public official status.

The Court in Hutchinson also rejected the media "bootstrapping" of a private person into a "public figure" by press generated notoriety. The Court noted that "clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." 443 U.S. at 135.

From New York Times up through Hutchinson the Supreme Court has unequivocally refuted any suggestion that any and all government employees from the highest to the lowest echelons of governmental employment warrant treatment as "public officials". The severe incursions on a public employee's rights to redress for reputational injury do not apply to each and every public official. It is noteworthy that the Court has taken pains on three occasions to reject the suggestion that the merest governmental connection suffices for "public official" status-its night watchman analysis in Rosenblatt, its rejection of an attorney-officer of the court as a public official in Gertz and its footnote

8 in Hutchinson. It is also worthwhile noting that the Supreme Court has not held that anyone as low ranking as a policeman or as a teacher is a public official. In Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971) the Court accepted, without deciding, the lower courts' determination that deputy chief of detectives of the Chicago Police Department was a public official.

In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), only one member of the Court denominated the deputy sheriff as a "public official." The Court, however, adopted for "purposes of this case only" the Louisiana court's determination that a parish sheriff was a "public official."

Although the Supreme Court has repeatedly rejected the notion of an all-encompassing public officialdom, a number of lower courts have ignored or misinterpreted the aforementioned caveats of Rosenblatt and Hutchinson. Specifically, a number of lower courts have extended "public official" status to the lower echelons of law enforcement officers. A number of these courts have followed the rationale of Coursey v. Greater Niles Township Publishing Corporation, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968). Coursey did not confront Rosenblatt's "footnote thirteen." As stated above, Rosenblatt rejected the notion of including all lower-level governmental employees into the ranks of "public officials." Coursey failed to analyze the close relationship between the "night watchman" and an ordinary patrolman. Indeed, given the proper circumstances, both of these positions "can have great potentiality for social harm" (Coursey, 239 N.E. 2d at 841). A number of lower courts have followed this lead. These courts have drafted lower-level police officers into the ranks of "public officials," thus imposing the stringent New York Times requirements upon them. The U.S. Supreme Court has never placed "lower-level" employees under the rubric of "public officials." The course of treatment of the concept "public officials" by the Supreme Court would seem to dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman. The

Supreme Court has consistently rejected the notion that all government employees should be subjected to the stringent New York Times burdens. "Footnote thirteen' of Rosenblatt constitutes a pivotal element in this delicate balancing of the competing reputational and free expression interests involved in the determination of status issues"(See Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria, 33 Buffalo Law Review 579, 667). Specifically, a "night watchman," a close relative to the beat policeman, is cited as not subject to "this test." As suggested herein, Hutchinson v. Proxmire also rejected the notion of an all encompassing New York Times standard.

Since Hutchinson however, there has been a growing number of cases reflecting a more sophisticated appreciation of the limitations of the "public official" concept. Thus it has been determined that a wide range of public employees are not "public officials". (See Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria, 33 Buffalo Law Review 579, 640-643). In McCutcheon v. Moran, 99 Ill. App. 3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1133 (1st Dist. 1981), the court held:

> "We are unwilling to place the imprimatur of 'public official' on a school teacher. Implicit in the reasoning of New York Times Co. v. Sullivan is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government. (Franklin v. Lodge 1108, BPOE (1979), 97 Cal.App.3d 915, 159 Cal.Rptr. 131). The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation.

More recently this court in Smith v. Copley Press, Inc., 140 Ill. App. 3d 613, 94 Ill.Dec. 785, 488 N.E.2d 1032 (4th Dist. 1986) determined:

> "Nevertheless, the Supreme Court cautioned that the 'public official' characterization, with the attendant application of the New York Times malice standards, should be reserved for those positions in government in which 'the public has [an] independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees ....'383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605. . . ."

The comment by the Court in Hutchinson was reviewed in Berkley v. Delia, 287 Md. 302, 413 A.2d 170 (1980) in a case involving a policeman. In that case the court expressed some concern about the conclusion accepted by the district court and the parties that the plaintiff was a public official, and stated:

> "The question of whether he is or is not such a public official has not been briefed or argued to us. Accordingly, we prefer to decide the case assuming arguendo that he is such a public official and to leave open in Maryland the question of whether a police officer at the very bottom level is a public official within the meaning of New York Times. In so doing we act in a manner similar to that of the Supreme Court in Time, Inc. v. Pape, 401 U.S. 279, 284, 91 S. Ct. 633, 636, 28 L. Ed. 2d 45, where the two lower courts 'were in agreement that the plaintiff Pape was a "public official" by virtue of his position as Deputy Chief of Detectives of the Chicago Police Department, and that the charges (before the Court) concerned his "official conduct."'" (413 A.2d at 180).

It is submitted that the carefully balanced position taken in Rosenblatt must be read with the all encompassing view thereafter expressed in Rosenblum v. Metromedia, 403 U.S. 29, 29 L.Ed.2d 296, 91 S. Ct. 811 (1971), which was thereafter rejected in Gertz, v. Robert Welch, Inc., 418 U.S.323, 41 L.Ed.2d 789, 94 S. Ct. 2997 (1974). The Supreme Court has given recognition to an equitable and fundamentally fair compromise between inherently competing and inconsistent interests. The first interest is to protect the First Amendment rights of those persons who oppose individuals with actual or potential power over the conduct of governmental matters. Those individuals - "public officials" - who are in the position to influence the decision making processes relinquish appreciably their claim to protection of basic interest in reputation. The other interest at stake is the interest in personal reputation. The Court seems to have granted approximate parity to the two interests, treating the interest in reputation as an equally compelling need which must not be subjected to substantial depreciation.

This court should view with skepticism the law decided during the period prior to Gertz which resulted in many public official determinations being made based upon generalized references to public interests. The case of Coursey should be re-examined particularly in light of Hutchinson v. Proxmire.

It is submitted that the courts should determine that there is a group of public employees who are "public officials" as a matter of law - such as all elected officials, high placed appointed officials, etc. There is also a group of public employees who should, as a matter of law, be declared not to be "public officials," such as the court house janitor, the 'night watchman', the jailer and a whole host of other lower echelon public employees - including the ordinary beat policeman. The analysis in Gertz would more appropriately apply to the ordinary beat policeman than to the person who has substantial responsibility for the conduct of government affairs. There is also a group of public employees who should be tested in each individual case as to whether they are "public officials" as a matter of fact . If this court concluded that the Plaintiff in the instant case, an ordinary beat policeman, is not, as a matter of law, not a "public official" then whether or not he is a "public official" must be tested on the facts presented by the Defendants in support of their position that he is such a "public official". There are no facts in the record that show the Plaintiff had substantial responsibility for the conduct of government affairs or in any way held a position to meet the New York Times tests of a "public official".